

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

JOSE PEDRO GARCIA,

Petitioner/Defendant,

vs.

**16-CV-750 MV/KK
04-CR-2242 MV**

UNITED STATES OF AMERICA,

Respondent/Plaintiff.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

On June 23, 2016, Jose Pedro Garcia filed a Motion to Correct Sentence Under 28 U.S.C. § 2255. (Doc. 1.) In his motion, Mr. Garcia challenges the validity of his sentence on the basis that he was unconstitutionally sentenced under the residual clause of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), which was found to be unconstitutionally vague in *Johnson v. United States*, --- U.S. ---, 135 S.Ct. 2551 (2015). On July 29, 2016, the United States filed its Response and “moves the Court to grant Petitioner’s Motion for relief.” (Doc. 3 at 2.) In conceding that Mr. Garcia’s request to be resentenced should be granted, the Government agrees with Mr. Garcia, as do I, that *Johnson* applies retroactively to his case. (*Id.* at 1); see *Welch v. United States*, --- U.S. ---, 136 S.Ct. 1257, 1268 (2016); *Schrivo v. Summerlin*, 542 U.S. 348, 351 (2004). The Government further asserts that it does not have sufficient evidence to successfully argue that Mr. Garcia’s three convictions for battery upon a peace officer qualify under the elements clause of the ACCA. (*Id.* at 1-2.)

Having considered the record in this and Mr. Garcia’s underlying criminal case, I conclude that Mr. Garcia is entitled to resentencing based on *Johnson*. I recommend that the

Court grant Mr. Garcia's motion, vacate Mr. Garcia's sentence, and set this case for resentencing.

Timely objections may be made pursuant to 28 U.S.C. § 636(b)(1)(c). Within fourteen (14) days after a party is served with a copy of these proposed findings and recommended disposition that party may, pursuant to Section 636(b)(1)(c), file written objections to such proposed findings and recommended disposition with the Clerk of the United States District Court for the District of New Mexico. A party must file any objections within the fourteen-day period allowed if that party wants appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.



KIRTAN KHALSA
United States Magistrate Judge